Supreme Court, U.S.
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No. 00 78

IN THE

Supreme Court of the United States

October Term, 1999

JOSEPH M. ANDERSON,

Petitioner,

vs.

NIAGARA MOHAWK POWER CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FOURTH JUDICIAL DEPARTMENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state appellate court's summary dismissal of a Native American's damages claim against a non-Indian corporate party because he failed to join a sovereign Indian Nation undermines Congress' express grant of jurisdiction to New York courts over private civil disputes between Indians and non-Indians (25 U.S.C. §233), violates the Supremacy Clause (Article VI, Cl.2) of the United States Constitution, or deprives Native Americans of due process or equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States' Constitution?

LIST OF PARTIES

Petitioner Joseph M. Anderson, a member of the Tuscarora Nation of Indians, owns and operates retail, wholesale and manufacturing businesses on the Tuscarora Indian Reservation.

Respondent Niagara Mohawk Power Corporation, is a publicly regulated utility electric and gas corporation, organized under the New York Transportation Corporations Law, which maintains and operates electrical distribution facilities on the Tuscarora Indian Reservation.

Pursuant to 25 U.S.C. §233, in August 1994, Anderson commenced a civil action in New York State Supreme Court against Niagara Mohawk Power Corporation for money damages for breach of a December 27, 1993 electric service contract.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph M. Anderson respectfully prays that a writ of certiorari issue to review the order of the New York Supreme Court, Appellate Division, Fourth Department, entered in this action on October 1, 1999. The instant case concerns an Indian's right to sue a New York corporation for money damages in New York State Supreme Court. Despite a federal statute (25 U.S.C. §233) specifically granting New York courts jurisdiction over civil actions between Indians and non-Indians, the Appellate Division of the New York State Supreme Court, Fourth Department, held that plaintiff cannot proceed with his breach of contract action against a New York public utility because he did not and cannot join the Tuscarora Nation of Indians as a party. The Appellate Division's decision undermines Congress' statutory grant of jurisdiction to New York courts, which was not conditioned on joinder of sovereign Indian Nations. The Court should grant a writ of certiorari to consider the important civil rights issues implicated by the Appellate Division's dismissal order - equal access to justice, due process, and enforcement of contract rights - issues of critical importance to Native Americans and all those transacting business with Native Americans.

OPINIONS BELOW

On April 13, 2000, the New York State Court of Appeals denied the petitioner's motion for leave to appeal from the order of the Appellate Division, Fourth Department.

The New York Court of Appeals' decision denying discretionary review of the Appellate Division's order is reproduced at Appendix p. A1 and is reported at 94 N.Y.2d 764, __ N.Y.S.2d ___, ____ N.E.2d ___ (N.Y. April 13, 2000).

The Appellate Division, Fourth Department denied Anderson's motion to reargue or for leave to appeal to the New York Court of Appeals, in an unreported order issued December 30, 1999, reproduced at Appendix p. A2. On October 1, 1999, the New York Supreme Court, Appellate Division, Fourth Department, dismissed Anderson's complaint for failure to join the Tuscarora Nation. The Appellate Division's memorandum decision, reported at 265 A.D.2d 817, 696 N.Y.S.2d 736 (4th Dept. 1999), is reproduced at Appendix pp. A4. The unreported order of the New York Supreme Court, Niagara County, entered December 10, 1998, denying Niagara Mohawk's motion for summary judgment and to renew its motion to dismiss for failure to join the Tuscarora Nation as a party, is reproduced at Appendix pp. A5-7.

JURISDICTION

The order of the New York Court of Appeals denying discretionary review was entered on April 13, 2000. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(a).

STATUTES INVOLVED

Section 233 of Title 25 of the United States Code (1983 main volume) Act of September 13, 1950, c.947, §1 64 Stat.845 (1950), provides as follows:

§233. Jurisdiction of New York State courts in civil actions.

> The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: Provided, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: Provided further, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: Provided further, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any

judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: And provided further, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: Provided further, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

STATEMENT OF THE CASE

On August 17, 1994, Petitioner Joseph Anderson sued Respondent Niagara Mohawk Power Corporation in New York State Supreme Court, seeking money damages for breach of contract. In a second cause of action, Anderson sought damages resulting from Niagara Mohawk's breach of its duty to provide electric service in a nondiscriminatory fashion, in violation of its published tariffs and the statutes which govern its conduct as a public utility (Record on Appeal, hereinafter "R." at 41-55, 255-261).

Anderson's claims are based on Niagara Mohawk's breach of a written December 27, 1993 contract to provide expanded electric service to Anderson's business on New York State Route 31 on the Tuscarora Indian Reservation. No relief is sought from the Tuscarora Nation. No interest was cited by the Tuscarora Nation that would in any way prevent the parties from adjudicating Anderson's claim for money damages (R. 269-275). In fact, there is absolutely nothing in the record to indicate that the Tuscarora Nation ever opposed Anderson's request for expanded service. No findings were made by the Appellate Division to demonstrate how a money judgment against Niagara Mohawk could inequitably affect the Tuscarora Nation.

1. Facts

In 1993, Anderson began a commercial expansion project, adjacent to his existing Route 31 business, including construction of a car wash and site preparation for an expanded retail plaza, which required additional electric service from Niagara Mohawk (R. 255-257).

On December 27, 1993, Niagara Mohawk entered into a written agreement with Anderson to upgrade the electric service at his business (R.169-276). Although Niagara Mohawk waived certain customer charges due to the expected revenue from the expanded service, the contract obligated Anderson to hire his own electrical contractor at considerable expense to install a new transformer pad and curb, conduit and wiring, an electrical switching station, and associated equipment to service the car wash and planned retail expansion (R.256-259, 262-267). The December 27, 1993 electric service contract is reproduced at Appendix, pp. A8-A11.

Niagara Mohawk provided service on the Tuscarora reservation for years without incident, and has continued to provide electrical power on the reservation to most Tuscarora customers (R. 283,310, 372-373). Beginning in August, 1993, prior to the agreement with Anderson, defendant's representatives met and exchanged correspondence with Leo Henry and Kenneth Patterson, Tuscarora chiefs who expressed concerns about non-Tuscaroras receiving electric service without their consent (R. 36-37,145-146,160). In November, 1993, defendant sought advisory relief from the New York Public Service Commission regarding service on Indian reservations (R. 169-206). Tuscarora Chiefs Webster Cusick and Arnold Hewitt advised Niagara Mohawk that one or two chiefs could not dictate who would receive electric service on

the reservation, without a consensus achieved by the Council, and that no official action of the Tuscarora Council of Chiefs had been adopted to change the status quo (R. 167-168,283,314,434-463).

Niagara Mohawk unilaterally announced in a January 6, 1994 letter to Tuscarora Chief Leo Henry (reproduced at Appendix, A12-13) that it would not provide any new or upgraded service on the Tuscarora Reservation.

Thus, less than two weeks after Niagara Mohawk contracted to provide Anderson with electric service for his business expansion, Niagara Mohawk (over the objection of Tuscarora Chiefs) determined that it would not provide any new or upgraded service on the Tuscarora Reservation, vitiating any alleged tribal consent provision (R. 390, 167-68, 285). The gist of Anderson's complaint is that Niagara Mohawks breached its contract by making a business decision to institute its "no new service policy." Instead of fulfilling its contract with plaintiff, and providing service on demand, as it had done for 60 years at Tuscarora, Niagara Mohawk sought advisory opinions from federal district court and the New York Public Service Commission (Appendix A14-15). Niagara Mohawk's federal suit against officials and members of the Tonawanda Seneca Nation was dismissed for lack of subject matter jurisdiction and failure to plead a justiciable controversy. *See, Niagara Mohawk Power Corporation v. Tonawanda Band of Seneca Indians,* 94 F.3d 747 (2d Cir.1996). The PSC petition for administrative reformation of Niagara Mohawk's franchise agreement also backfired, ultimately leading to a determination that its Indian franchise agreements were void (R.66-68, 642-655). *See, Niagara Mohawk Power Corporation v. Eastern Area Director, Bureau of Indian Affairs,* 32 IBIA 276 (IBIA

96-54-A, July 23, 1998). The New York PSC's decision outlining Niagara Mohawk's request for reformation of its Indian franchise agreements is reproduced at Appendix pp.A16-21. Niagara Mohawk continued to provide electricity to existing customers and sent its service trucks onto Tuscarora lands on a daily basis (R. 258-59, 283, 286, 310, 349, 362-383). To add insults to injury, Niagara Mohawk made several *ad hoc* exceptions to its "no new service" policy to hook up other Tuscarora customers (380-388) and even sued Anderson's brother and other Tuscarora citizens, claiming interference with its contract and franchise rights at Tuscarora to provide new service to a state affiliated reservation school, while at the same time contending that it was "impossible" to perform its contract with Anderson (R. 551-568).

In late 1993 and early 1994, Niagara Mohawk exchanged and approved technical drawings and proposals with Anderson's agents and electrical contractors in furtherance of the contract and Anderson completed the site work, constructed the transformer pad, installed the switching station and invested substantial funds, all with Niagara Mohawk's knowledge and approval (R. 258,362-366). At the last minute, Niagara Mohawk refused to connect the service line (R.259, reproduced in the Appendix hereto at pp. A14-15), relying on its January 1994 policy decision not to provide new or upgraded service at Tuscarora.

Anderson sued Niagara Mohawk to recover damages for: (i) construction and acquisition expenses incurred in connection with the stalled development, (ii) additional costs incurred to provide alternative power; and (iii) lost profits resulting from Niagara Mohawk's failure to provide electric service (R.45-48, 260).

2. Proceedings

In December 1994, the New York Supreme Court, Niagara County, denied Niagara Mohawk's motion to dismiss for failure to join the Tuscarora Nation as a necessary party (R.464-65). In November 1996, the Appellate Division, Fourth Department denied Niagara Mohawk's motion to reinstate its appeal of the trial court's order, after the appeal had been dismissed for failure to prosecute (R. 468).

After discovery closed and a trial date was set, Niagara Mohawk moved for summary judgment and to renew its motion to dismiss for failure to join the Tuscarora Nation as a party. On December 10, 1998, the New York Supreme Court, Niagara County, denied both defense motions (Appendix A5-7).

On October 1, 1999, the Appellate Division, Fourth Department, reversed the trial court's order. The Appellate Division's October 1, 1999 memorandum decision and order granted Niagara Mohawk's motion to renew, and upon renewal, granted the defendant's motion to dismiss the complaint for failure to join the Tuscarora Nation as a necessary party, without addressing the merits of the motion for summary judgment (Appendix A3-4).

On December 30, 1999, the Appellate Division, Fourth Department denied Anderson's motion for leave to reargue, or for leave to appeal to the New York Court of Appeals (Appendix A2). Anderson's motion for leave to appeal directly to the New York Court of Appeals was denied in an order entered by the Court of Appeals on April 13, 2000 (Appendix A1).

No hearings were ever held in this matter. In response to Niagara Mohawk's initial motion to dismiss (R. 464) and its 1998 motion to renew, Anderson asserted to the trial court in briefs, affidavits and at oral argument that compulsory joinder of the Tuscarora Nation was not required and conflicted with the federal statute granting New York State courts jurisdiction to hear disputes between Indians and non-Indians (25 U.S.C. §233).

Since Anderson did not seek specific performance or injunctive relief, he argued that because the Tuscarora Nation has sovereign immunity, it could not be adversely affected by a money judgment against Niagara Mohawk. At the Appellate Division, Anderson again argued that Congress' statutory grant of jurisdiction to New York courts to resolve civil disputes on Indian Reservations was not conditioned in any way on joinder of sovereign nations. March 31, 1999 Brief for Plaintiff-Respondent Joseph M. Anderson, at pp. 2, 15-19. The same arguments were raised on motions to reargue in the Appellate Division, and on Anderson's application for discretionary review by the New York Court of Appeals. *See,* Anderson's February 2, 2000 Statement in Support of Motion for Leave to Appeal to the Court of Appeals at pp.3, 10-16; November 5, 1999 Affidavit of Gerald T. Walsh in support of Anderson's Motion to Reargue and for Leave to Appeal to the Court of Appeals, at pp.3-10, reproduced at pp.A12-A19 of Petitioner's Motion to the Court of Appeals.

The trial court, on two occasions, exercised its statutory discretion under New York CPLR 1001, to deny Niagara Mohawk's motion to dismiss the action for failure to join the Tuscarora Nation (R. 2, 464-65, Appendix A5-6). Under CPLR 1001(b), before dismissing an action for nonjoinder, the court must consider five factors: whether the plaintiff has another effective remedy if the action is dismissed; any prejudice which may accrue; whether prejudice might be avoided; the feasibility of a protective provision; and whether an effective judgment may be rendered. None of these factors were discussed by the Appellate Division.

Because Anderson's action for damages against Niagara Mohawk cannot impact the Tuscarora Nation, Anderson submits that the defendant's motion to dismiss for failure to join the Tuscarora Nation was properly denied in December 1994 by the trial court, the appeal of that order was correctly dismissed by the Appellate Division, Fourth Department in November 1996 and the trial court properly denied re-argument or renewal on December 10, 1998.

REASONS FOR GRANTING THE WRIT

I. The Appellate Division's Dismissal Order Undermines 25 U.S.C. §233, Congress' Express Grant of Jurisdiction to the Courts of New York State to Hear Civil Disputes Involving Indians, and Raises Substantial Supremacy Clause and Due Process Concerns.

The Court should review the Appellate Division's order because it undermines Congress' intent to resolve jurisdictional ambiguities in civil matters arising on Indian lands.

The Appellate Division's decision nullifies Congress' express grant of jurisdiction pursuant to 25 U.S.C. §233, and other similar civil jurisdictional statutes involving Indian lands, by requiring joinder of Indian Nations to private civil disputes. Congress' jurisdictional grant would be hollow if either Indian or non-Indian defendants could evade the law simply by demanding that state courts require joinder of a tribe as a necessary party, no matter how remote a tribe's assertion of an interest in the outcome.

Congress enacted 25 U.S.C. §233 to resolve jurisdictional ambiguities for resolving private civil disputes involving New York Indians. *See, Bowen v. Doyle,* 880 F. Supp. 99, 120-21 (W.D.N.Y 1995) [reviewing legislative history demonstrating Congress' intent to remedy the jurisdictional void created by *United States v. Forness,* 125 F.2d 928 (2d Cir.1942)]; *see also* 1950 U.S. Code Cong. Service, p.3731; Congressional Record, 81st Congress, 2nd Session, pp.12453-63 (House Debate on Conferring Jurisdiction on New York Courts, August 14, 1950). In *Bryan v. Itasca County,* 426 U.S. 373, 383 (1976), this Court held that Public Law 280, the equivalent of 25 U.S.C. §233 in several Western and Midwestern states, acknowledged

Congress' intent to remedy the lack of adequate opportunities for Indians to resort to court to seek redress of wrongs.

It is hard to imagine how the Tuscarora Nation or any of its chiefs would be inequitably affected by a judgment for money damages against Niagara Mohawk. No tribal resolution or affidavit by a tribal official, or any evidence whatsoever was offered to demonstrate that the Tuscarora Nation would be adversely affected by a money judgment against Niagara Mohawk. Indeed, in the instant action, there is no evidence in the record to show any indication that the Nation did not consent to Anderson's contract for expanded service at his Route 31 location. The only evidence in the record on this point, the sworn testimony of Tuscarora Chief Webster Cusick, is directly contrary to Niagara Mohawk's position (R.434-463).

The instant case does not concern title to land on the reservation, or require specific performance of certain acts on the reservation. *See, e.g. Anderson v. Town of Lewiston,* 244 A.D.2d 965 (4th Dept. 1997) (request for injunctive relief and specific performance of the Town of Lewiston's agreement to provide water service). Here, Niagara Mohawk made a business decision not to abide by its contract with Anderson, but chose instead to provide service to other Tuscarora Indians on a discriminatory basis.

The Appellate Division's memorandum decision is devoid of analysis and follows a pattern established in two other recent Fourth Department memorandum decisions involving civil disputes between Tuscarora Indians and non-Indians, neither of which were not ripe for review by the Court of Appeals, due to a lack of a final determination within the meaning of the New York Constitution in one case and lack of substantial constitutional question to justify a direct appeal in the other.

See, Niagara Mohawk Power Corporation v. (Douglas) Anderson, 258 A.D.2d 958 (4th Dept. 1999), *motion for leave to appeal dismissed*, 93 N.Y.2d 958 (June 8, 1999) due to lack of a final determination; *Anderson v. Town of Lewiston*, 244 A.D.2d 965 (4th Dept. 1997), *appeal dismissed* 91 N.Y.2d 920 (1998), for lack of a substantial constitutional question.

In the *Town of Lewiston* case, the Court of Appeals' order dismissing the plaintiff's direct appeal was never served by the Town with notice of entry, thus plaintiffs' time to move for leave to appeal never started running. The Town of Lewiston never followed through on a threat to shut off the plaintiffs' water in that case, thus rendering the injunction action moot with no controversy to present to the Court of Appeals. In *Niagara Mohawk Power Corporation v. Anderson, supra,* Niagara Mohawk sued Douglas Anderson and several other Tuscarora citizens for alleged interference with Niagara Mohawk's contract right to provide expanded electric service to a Tuscarora Reservation school. In that case, the Appellate Division affirmed Supreme Court's dismissal of counterclaims to compel Niagara Mohawk to provide service to a defendant and proposed intervenors who were unable to obtain electrical power. Notably, Niagara Mohawk did not join the Tuscarora Nation as a party to its claim against private Tuscarora citizens.

There is no tribal court at the Tuscarora Nation. The only judicial forum for resolution of the civil dispute between Anderson and Niagara Mohawk is the New York State Supreme Court, by virtue of Congress' express grant of jurisdiction in 25 U.S.C.§233. Review by the Court is appropriate because the Appellate Division's decision would interfere with the federal statutory scheme for resolving civil disputes on Indian reservations, a clear violation of the Supremacy Clause.

The Supremacy Clause forbids state courts to dissociate themselves from federal law or refuse to exercise jurisdiction bestowed by Congress because of disagreement with the federal law or refusal to recognize the superior authority of its source. *Howlett By and Through Howlett v. Rose*, 496.U.S. 356, 380 (195) (under the Supremacy Clause, state court could not refuse to hear a §1983 suit against a school board on the basis of sovereign immunity); *Testa v. Katt*, 330 U.S.386 (1947); *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876); *Mondue v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 58 (1912) ("the existence of jurisdiction creat[ed] an implication of duty to exercise it").

By blocking Anderson's access to court, the Appellate Division's order, if not reviewed by this Court, will deprive Native Americans of their Fifth and Fourteenth Amendment right to due process and equal protection of the laws, in contravention of the principles established by the Court beginning with *Griffin v. Illinois,* 351 U.S. 12 (1956), (access to appeals in criminal cases) and *Boddie v. Connecticut,* 401 U.S. 371 (1971), (access to the judicial process in civil cases). In *Boddie,* the Court held that states cannot shut the courtroom doors to indigent plaintiffs because the state has an ultimate monopoly of all judicial process and its enforcement machinery, as a practical matter, if disputes cannot be successfully settled between the parties, the court system is the only forum effectively empowered to settle their disputes. 401 U.S. at 378-379, 388. Given Congress' express jurisdictional mandate, New York's courts may not restrict a Native American's access to justice by invoking a procedural rule to mandate dismissal whenever an adverse party suggests a tribal interest might be affected.

The trial court determined that Anderson had raised genuine issues of fact to be resolved by a jury. Without any consideration of the merits of Anderson's claim, the Appellate Division's decision deprives Anderson of a meaningful opportunity to be heard. The courts of New York are bound to do equal justice under the law; the state may not make its judicial processes available to some, but deny them to others, based on wealth, the color of one's skin, or one's ethnic background. *Boddie v. Connecticut, supra,* 401 U.S. at 388 (Brennan, concurring). Since Congress refused in 25 U.S.C. §233 to condition a Native American's access to New York courts on tribal consent or joinder, Anderson was entitled to have his case decided on the merits.

II. The Appellate Division's Order Conflicts with Federal Circuit Courts of Appeals Decisions Construing Congressional Grants of Jurisdiction on Indian Lands.

The summary dismissal of Anderson's case conflicts with decisions of the United States Courts of Appeals for the Second Circuit, the Seventh Circuit and the Tenth Circuit. First, the Appellate Division's order conflicts with the Second Circuit Court of Appeals' holding in *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir.2000) that a tribe was not an indispensable party to a film producer's contract, tort, and copyright infringement claims. Notwithstanding the Mashantucket Pequot Tribe's sovereign immunity, the Second Circuit held in *Bassett* that the tribe was not indispensable to plaintiff's claims against a privately held Indian museum corporation and its individual administrators, including her effort to enjoin further showing of the subject film. Like the district court reversed in *Bassett,* the Appellate Division here failed to explain how the Tuscarora Nation's interest might be

harmed if a jury awarded money damages to Anderson and failed to consider that dismissal of Anderson's claim would prevent him from vindicating his rights against Niagara Mohawk in any forum.

Similarly, in *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999), the United States Court of Appeals for the Seventh Circuit reversed a District Court order dismissing an action to challenge a tribal constitutional election for failure to join the tribal governing board as a necessary party. Even though the tribal governing board contended that the amendments proposed in the election dealt with matters of fundamental importance to the tribe's sovereign interests, the Seventh Circuit Court of Appeals held that the fact that a tribal governing body has an interest in litigation is not enough to make a necessary party and that the tribe was free to intervene in the case if it wished to do so. *Id.* at 668-669.

The Appellate Division's decision also conflicts with the Tenth Circuit Court of Appeals' holding in *Davis v. United States, 192 F.3d 951* (10th Cir. 1999) that the Seminole Nation was not *per se* an indispensable party to a claim by a purported member for a certificate of degree of Indian blood. The Court of Appeals in *Davis* reversed the district court's dismissal for failure to join the Seminole Nation as a necessary party.

Just as the Seventh Circuit Court of Appeals held in *Thomas, supra,* 189 F.3d at 668, that Congress' refusal to note the tribal interest in the federal tribal constitutional elections would permit actions challenging such elections to proceed without joining the tribal governing body, in the instant case, since Congress' refused in 25 U.S.C. §233 to condition access to New York courts on tribal consent or joinder, Anderson's

claims should have been determined on the merits. In light of the above cases, an Indian Nation is not *per se* an indispensable party to an action arising on an Indian Reservation. The Court should grant a Writ of Certiorari because the Appellate Division's decisions conflicts with Federal Indian Law. *See, Katzinger v. Chicago Metallic Mfg. Co.*, 329 U.S.394 (1947).

III. The Appellate Division's Order, If Allowed to Stand, Would Result in a Jurisdictional Void for Persons and Firms Engaged in Commerce on Indian Lands.

The instant case is the converse of *Williams v. Lee,* 358 U.S.217 (1959) where the Court reversed an Arizona court's exercise of civil jurisdiction over a Navajo reservation dispute in the absence of a federal statute like 25 U.S.C. §233. Although the prevailing rule since *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, (1832) had been that state courts may not exercise jurisdiction over Indian tribal affairs or claims arising on or relating to Indian tribal land, Congress, pursuant to Article I §8, cl. 3 of the Constitution, has the power to modify this rule: "[w]hen Congress has wished the States to exercise this power it has expressly granted them jurisdiction which *Worcester v. Georgia* had denied." *Williams v. Lee*, 358 U.S. at 221. The Court in *Williams v. Lee* cited 25 U.S.C. §233 as an example of a broad Congressional grant of civil and criminal jurisdiction. *Id.* Absent a similar Congressional grant of jurisdiction, the Court in *Williams* reversed the Supreme Court of Arizona's decision upholding state court jurisdiction over an Indian trader's suit for goods sold and delivered on the Navajo reservation. The Court granted certiorari because the Arizona decision was "a doubtful determination of the important

question of state power over Indian affairs." *Williams v. Lee,* 358 U.S. at 218.

By blindly invoking the necessary party doctrine, the Appellate Division has thwarted Congress' grant of jurisdiction under 25 U.S.C. §233. This court should grant a writ of certiorari to address the important question of whether state courts can evade the duty expressly bestowed upon them by Congress pursuant to 25 U.S.C. §233 and Public Law 280. As commercial enterprises continue to develop on Indian lands, individuals and firms transacting business on Indian lands need to know whether a forum exists to resolve their civil disputes. The Appellate Division's decision creates uncertainty where Congress had acted to remove it. The Court should review the Appellate Divisions order because it presents important questions regarding the accommodation of Federal and State power over Indian Affairs. *See, Kosgdar v. National Cash Register*, 417 U.S. 62, 65 (1974).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: Buffalo, New York
July 11, 2000

Respectfully submitted,

JOSEPH E. ZDARSKY
Counsel of Record
Zdarsky, Sawicki & Agostinelli
GERALD T. WALSH, *Of Counsel*
404 Cathedral Place
298 Main Street
Buffalo, New York 14202
(716) 855-3200
Attorneys for Petitioner

APPENDIX

Order of the Court of Appeals of the State of New York, Dated April 13, 2000.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of April 2000.

PRESENT, HON. JUDITH S. KAYE,
Chief Judge, presiding.

4-13 Mo. No. 164

Joseph M. Anderson,

Appellant,

v.

Niagara Mohawk Power Corporation,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ STUART M. COHEN
Stuart M. Cohen
Clerk of the Court

Order of the Appellate Division, Fourth Judicial Department, Entered December 30, 1999.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

MOTION NO. 1124/99
DOCKET NO. CA 99-174

PRESENT: GREEN, J.P., LAWTON, PIGOTT, JR., SCUDDER AND BALIO, JJ.

JOSEPH M. ANDERSON,
Plaintiff-Respondent,

v.

NIAGARA MOHAWK POWER CORPORATION,
Defendant-Appellant.

Plaintiff having moved for reargument of, or in the alternative, leave to appeal to the Court of Appeals from an order of this Court entered October 1, 1999,

Now, upon reading and filing the affidavit of Gerald T. Walsh sworn to November 5, 1999, the notice of motion with proof of service thereof, the opposing affidavit of Mark R. McNamara sworn to November 11, 1999, the opposing affirmation of Kendra E. Winkelstein dated November 12, 1999, and due deliberation having been had thereon,

It is hereby ORDERED that the motion be, and the same hereby is, denied.

Entered: December 30, 1999 CARL M. DARNALL,
Clerk

Order of the Appellate Division, Fourth Judicial Department, Entered October 1, 1999.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1124

PRESENT: GREEN, J.P., LAWTON, PIGOTT, JR., SCUDDER AND BALIO, JJ.

CA 99-174

JOSEPH M. ANDERSON,
Plaintiff-Respondent,

v.

NIAGARA MOHAWK POWER CORPORATION,
Defendant-Appellant.

Niagara Mohawk Power Corporation having appealed to this Court from certain parts of the order of the Supreme Court, entered in the Niagara County Clerk's Office on December 10, 1998, and said appeal having been argued by Mark R. McNamara of cousnel for defendant-appellant, Joseph E. Zdarsky of counsel for plaintiff-respondent, submitted by Harold M. Halpern of counsel for Tuscarora Nation of Indians, amicus curiae, and due deliberation having been had thereon,

It is hereby ORDERED that the order insofar as appealed from be and the same hereby is unanimously reversed on the law without costs, the motions are granted and the complaint is dismissed.

Memorandum that is hereby made a part hereof.

Entered: October 1, 1999 CARL M. DARNALL, Clerk

Memorandum Decision of the Appellate Division, Fourth Judicial Department, Entered October 1, 1999.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

(1124) CA 99-174. (Niagara Co.)—JOSEPH M. ANDERSON, PLAINTIFF-RESPONDENT, V NIAGARA MOHAWK POWER CORPORATION, DEFENDANT-APPELLANT.—Order insofar as appealed from unanimously reversed on the law without costs, motions granted and complaint dismissed. Memorandum: Supreme Court should have granted the motion of defendant to renew its prior motion to dismiss the complaint for failure to join the Tuscarora Indian Nation as a necessary party to this action, and, upon renewal, should have granted the prior motion and dismissed the complaint (*see, Niagara Mohawk Power Corp. v. Anderson,* 258 AD2d____ [decided Feb. 10, 1999]; *Anderson v. Town of Lewiston,* 244 AD2d 965, *appeal dismissed* 91 NY2d 920). We therefore reverse the order insofar as appealed from, grant the motion to renew and, upon renewal, grant the prior motion and dismiss the complaint. In view of our determination, it is unnecessary to reach the remaining issues. (Appeal from Order of Supreme Court, Niagara County, Joslin, J.—Summary Judgment.) PRESENT: GREEN, J. P., LAWTON, PIGOTT, JR., SCUDDER AND BALIO, JJ. (Filed Oct. 1, 1999.)

Order of Honorable Norman E. Joslin, J.S.C., Granted December 9, 1998.

At an IAS Term of the Supreme Court of the State of New York, held in and for the County of Niagara, at the Courthouse thereof in Niagara Falls, New York on the 13th day of July, 1998.

PRESENT: Norman E. Joslin, J.S.C.
Justice Presiding

ORIGINAL FILED
DEC 10, 1998
WAYNE F. JAGOW
NIAGARA COUNTY CLERK
LOCKPORT, NEW YORK 14094

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

JOSEPH M. ANDERSON,

Plaintiff,

vs.

NIAGARA MOHAWK POWER CORPORATION,

Defendant.

Index No. 087329

ORDER

The defendant having made a motion for summary judgment and to renew its prior motion to dismiss for failure to join the Tuscarora Nation as a party, and the Tuscarora Nation having made a motion for leave to serve a brief and participate in oral argument, and said motions having regularly come on to be heard at an IAS

Term before the undersigned Justice of the Supreme Court, (and defendant having made a motion to settle the order,) (NEJ)

NOW, THEREFORE, upon reading and filing the plaintiff's notice of motion dated March 27, 1998, the supporting affirmation of Mark R. McNamara dated March 27, 1998 and the exhibits annexed thereto, the supporting affidavit of Gerald N. O'Neill sworn to March 24, 1998 and the exhibits annexed thereto, the reply affirmation of Mark R. McNamara dated July 8, 1998 and the exhibits annexed thereto, the affidavit of Paul Martin sworn to July 8, 1998 and the exhibits annexed thereto, and the reply affidavit of Gerald N. O'Neill sworn to July 7, 1998, and the exhibits annexed thereto, all in support of the defendant's motions; the notice of motion of the Tuscarora Nation for leave to appear as amicus curiae dated April 20, 1998 and the supporting affirmation of Harold M. Halpern, Esq. dated April 20, 1998; and the affidavit of Gerald T. Walsh, Esq., sworn to June 10, 1998 and the exhibits annexed thereto, the affidavit of Joseph M. Anderson, sworn to June 10, 1998, and the exhibits annexed thereto, all in opposition to the above motions, (and the papers on settlement of the order,) (NEJ) and the court having heard Hiscock & Barclay, LLP. (Mark R. McNamara, Esq., of counsel) in support of the plaintiff's motions; Borins, Halpern, Stromberg & Paskowitz (Harold M. Halpern, Esq., of counsel) in support of the Tuscarora Nation's Motion; and Zdarsky, Sawicki & Agostinelli (Joseph E. Zdarsky, Esq., of counsel) in opposition thereto, and due deliberation having been had thereon, it is hereby

ORDERED, that the defendants' motions for summary judgment and to renew defendant's motion to dismiss are hereby denied in all respects, and it is further

ORDERED, that the motion by the Tuscarora Nation for leave to serve a brief and participate in oral argument is hereby granted in all respects.

ENTER

s/ NORMAN E. JOSLIN
Norman E. Joslin, J.S.C.

GRANTED
December 9, 1998

Letter Dated December 27, 1993,
Re: Electric Service Proposal.

NM NIAGARA MOHAWK

NIAGARA MOHAWK POWER CORPORATION 1720 NEW ROAD,
NIAGARA FALLS, NEW YORK 14304 TELEPHONE (716) 236-2735

December 27, 1993

Mr. Joseph Anderson
2293 Saunders Settlement Road
Sanborn, NY 14132

Re: New Electric Service
2293 Saunders Settlement Road, Sanborn

Dear Mr. Anderson:

Enclosed for your review is our Electric Service Proposal for your new project at the above address.

Please review this proposal and contact me as soon as possible with any questions you may have. Due to the projected revenue, the normal customer charges that apply for this type of service are waived. If you approve the proposal as presented, please sign the enclosed copy of the letter and return it to my attention.

I look forward to working with you in order to successfully complete this project. If you require further information, please call me at 236-2751.

Very truly yours,
NIAGARA MOHAWK POWER CORPORATION

s/ PEGGY L. NOGARO/jld
Peggy L. Nogaro
Consumer Representative

PLN/jld
Enclosures
93:0955

cc: Mr. John Suita
CIR Electric

Approved: s/ JOSEPH ANDERSON
Joseph Anderson

Name:	Smokin' Joes (Tuscarora Development Company)
Service Address:	2293 Saunders Settlement Road, Sanborn, NY
Service Request:	120/208 Volt, 3-phase, 4-Wire, 60 hertz, 1200 amp electric service with an estimated maximum demand of 400 KW.
Type of Service:	Underground primary service to padmounted transformer.
Short Circuit Current:	The customer receiving equipment should be capable of interrupting the calculated RMS symmetrical short circuit current of 77,100 amperes at 208 volts.
Enclosed Drawings & Specifications:	1) Job Sketch dated December 10, 1993 2) "Supplement to Specifications for Electrical Installations"—Electric System Bulletin (ESB) #754 for Pad Mounted Transformers sketches 2, 3 & 5.

Customer's Responsibility:	*Transformer Pad:* Customer shall construct a suitable concrete pad for the 500 KVA transformer in accordance with ESB #754—figures 2, 3 & 5. Protective bumpers shall be provided, and installed by the customer as outlined on the job sketch. Prior to construction of the pad foundation, please notify Niagara Mohawk's Inspection Department at 236-2711.
	Primary Conduit: Customer to install approximately 240 feet of 2-5'' conduits from the transformer pad to Pole #2287 and include 2-5'' galv. steel, 42'' radius ells at the pad and at the pole and 1-5'' galv. steel 10' riser at the pole.
	Secondary Conduit & Cable: Customer to install service conduits and cable from pad mounted transformer to customer's receiving equipment.
Niagara Mohawk's Responsibility	NMPC will install approximately 280 circuit feet of 3 1/C #2 single conductor, lead covered 15 KV cable with a single conductor #2 concentric neutral from Pole #2287 to the pad mounted transformer.

Metering:	Before finalizing the service plan, please contact Niagara Mohawk's Meter Department at 236-2704 for review of meter location, secondary cable termination, and service entrance equipment.
Lead Time:	Niagara Mohawk will require a lead time of weeks for construction and delivery of materials. Upon receiving all the necessary permits for Niagara Mohawk Power Corporation, rights-of-way, and the enclosed acceptance letter, this project will be added to our construction schedule.
Customer Contribution:	Due to projected revenue, the normal customer charges that apply for this type of service installation are waived. However, they are subject to periodic review over a three-year period to verify that the waiver is justified. Niagara Mohawk reserves the right to bill the customer an adjusted contribution in accordance with our PSC Filed Rate Tariff if the amount of such waivers prove unwarranted.
PREPARED BY:	Peggy L. Nogaro, Consumer Representative
PHONE:	(716) 236-2751
DATE:	December 22, 1993

Approved: s/ JOSEPH ANDERSON
Joseph Anderson

A12

Letter Dated January 6, 1994, From Gerald N. O'Neill to Chief Leo Henry.

NIAGARA MOHAWK POWER CORPORATION 1720 NEW ROAD,
NIAGARA FALLS, NEW YORK 14304 TELEPHONE (716) 236-2735

January 6, 1994

Chief Leo Henry
2006 Mt. Hope Road
Lewiston, NY 14092

Dear Chief Henry:

This is to notify you that, on the advice of our legal counsel, Niagara Mohawk is rescinding the verbal agreement we made with you and other members of the council of chiefs at our meeting on August 5, 1993.

As I told you at that time, the arrangement whereby you or your representative would tell us whom we could serve was highly irregular, and is contrary to Niagara Mohawk's charter to serve all customers in our franchise territory. Our Company attorneys feel strongly that we cannot accept this arrangement. The advice I have been given from them is that we should not serve any new customers until the federal court case with the Seneca Nation on the Tonawanda Reserve is settled, and we receive a ruling on the filing we made with the New York State Public Service Commission.

I took the position with the attorneys that I would prefer to return to the policy of serving all new applicants who meet the requirements for service. I told them that this is more in line with our franchise agreement. I also recall you saying during our August meeting that you do not want to get to the point where

we are not serving any new customers on Tuscarora lands. This could have a very detrimental affect on your people, since we have some new requests for service already pending, and you typically have several new services connected each year.

Please let me know your feelings on this. I will be happy to meet with you again, if that is your desire, or you may call me at 236-2738.

Sincerely,

NIAGARA MOHAWK POWER CORPORATION

s/ GERALD N. O'NEILL
Gerald N. O'Neill
District Manager

GNO/jld
94:0010

Letter Dated January 17, 1994, From John W. Keib to Joseph E. Zdarsky.

NM NIAGARA MOHAWK

NIAGARA MOHAWK POWER CORPORATION
300 ERIE BOULEVARD WEST, SYRACUSE, NEW YORK 13202
/TELEPHONE (315) 474-1511

JOHN W. KEIB
Assistant General Counsel

January 17, 1994

VIA TELEFAX (716-855-3101) AND REGULAR MAIL
Joseph E. Zdarsky, Esq.
Zdarsky, Sawicki & Agostinelli
404 Cathedral Place
298 Main St.
Buffalo, New York 14202

RE: Application of Joseph Anderson for power on the Tuscarora Reservation

Application of Stonehorse Lone Goeman, et al for power on the Tonawanda Reservation

Dear Mr. Zdarsky:

We have carefully considered the request that you and your clients (above referenced) have made for power. As you know, the issue of providing power over the objections of those who purport to speak for the Tribe is already a subject of litigation. As you also know, Niagara Mohawk has petitioned the Public Service Commission to give us direction in this regard.

We are prepared to provide power to your clients as long as the Public Service Commission advises us that it is appropriate to do so. We are making every effort to resolve this matter by seeking guidance from Federal District Court and the Public Service Commission. We seek your assistance in this regard, and urge you to make your position known to the Public Service Commission, so that electric service may be extended to your clients as soon as possible.

Very truly yours,

s/ JOHN W. KEIB
John W. Keib
Assistant General Counsel

JWK:dl
1/17/94 78443.1

Decision of the New York State Public Service Commission, Dated April 19, 1995.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a Session of the Public Service Commission held in the City of Albany on April 19, 1995

COMMISSIONERS PRESENT:
Harold A. Jerry, Jr., Chairman
Lisa Rosenblum
William D. Cotter
Raymond J. O'Connor
John F. O'Mara

Case 93-E-0947— Petition of Niagara Mohawk Power Corporation For a Declaratory Ruling That an Indian Tribal Council's Consent Prerequisite Negates NMPC's Duty to Provide Service on Indian Reservations and, if NMPC's Franchises Are Invalid, NMPC's Obligation to Serve the Reservation Ceases, Absent a Waiver of Sovereign Immunity by the Nation.

DECLARATORY RULING
(Issued and Effective April 19, 1995)

BY THE COMMISSION:

BACKGROUND

On November 4, 1993, Niagara Mohawk Power Corporation (NMPC) filed a petition requesting a declaratory ruling that the Commission find that NMPC had no obligation under the Public Service Law to provide service on Indian reservations. It also requested that the Commission find that if NMPC's franchises were invalid, then NMPC's obligation to serve the reservations ceased unless there was a waiver of tribal sovereign immunity. Finally, it requested that the Commission find that NMPC was not required to enter into a franchise with respect to an Indian reservation absent a waiver of sovereign immunity from the respective Indian Tribe or Nation.

A number of Indian nations have responded, asserting that the Commission lacks authority to rule on these matters under the doctrine of sovereign immunity. Some of them have requested oral argument.

Niagara Mohawk Power Corporation (NMPC) maintains and operates electric distribution facilities to all eight Indian reservations that are located within the boundaries of its service territory. NMPC has agreements with the Onondaga, St. Regis, Tonawanda and Tuscarora Indian Nations to construct, maintain and operate electric lines, poles, wires and cables as necessary for the operation of electric lines on and through each respective reservation for 99 years. These agreements were entered into by NMPC's predecessors-in-interest and are dated from 1926 to 1940.

The geneses of the petition are actions taken by several Indian Councils representing several Nations which NMPC contends preclude it from meeting its statutory obligations under the Public Service Law. NMPC alleges that they have become "unwillingly

involved in intra-Indian disputes on the Tuscarora, Tonawanda and Onondaga Indian reservation" (Pet. ¶8). Specifically, two Indian Tribal Councils, the Tuscarora Nation and the Tonawanda Band of Seneca Indians Nation, are requiring their consent before NMPC may provide services to an applicant. On the Onondaga reservation, power was disconnected to three business establishments because the owners had not paid tribal taxes. NMPC crews were advised by the Onondaga Sheriff's Department not to enter the reservation because of the potential for violence. NMPC was required to obtain the Council of Chiefs' consent before reconnecting services.

In the three franchise agreements, there is no provision for NMPC to obtain the prior consent of the respective Council prior to hooking up service for an applicant. NMPC argues that the imposition of a Tribal consent requirement "results in discriminating service practices and the granting of an unreasonable preference to one customer over another." (Pet. ¶14).[1] Therefore, NMPC requests that the Commission find that NMPC is not required to provide service on the reservation if a Council is first required to give its consent.

Further, NMPC states that the franchise agreements are now being challenged and if they are found to be invalid, their obligation to service the reservations will cease unless each Nation waives its sovereign immunity. NMPC alleges that certain chiefs have challenged the validity of the franchise agreements, claiming they lack appropriate federal approvals.

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[1] Public Service Law §65(3) states, in part, that "No... electric corporation... shall make or grant any undue or unreasonable preference or advantage to any person, ...or subject any particular person... to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Responses were filed by the Seneca Nation of Indians', the Oneida Indian Nation of New York, the St. Regis Mohawk Tribe, the Onondaga Nation Response, and a joint response by the Tonawanda Band of Seneca Indians and the Tuscarora Nation of Indians. Each Nation argued that the Commission should not grant NMPC's petition because it lacks jurisdiction over Indian Tribes. They argued that Indian Nations are sovereign nations and, therefore, are not subject to the jurisdiction of state courts. The Nations also asserted that the sovereignty of Indian Nations has long been recognized and that each Nation is entitled to immunity. Any waiver of sovereign immunity must be unequivocally expressed, which has not occurred here.

A response was also filed by the Applicants for Service: Stonehorse Lone Goeman, Rex Doctor, John Redeye, Peter Poodry, David Peters, (Residents of the Tonawanda Indian reservation); Joseph M. Anderson, Morley Clause (Residents of the Tuscarora Indian reservation); and Kenneth Papineau, Veronica Papineau, Oliver R. Hill (Residents of the Onondaga Indian reservation). These individuals maintain residences and/or businesses on reservations and state they have been either denied electric service or threatened with denial of service to their homes and/or businesses.

The Applicants for Service urge that the denial of power is a "substantial interference with [their], safety and welfare. . ." They state that NMPC has allowed itself to be used for political purposes by the few tribal chiefs who claim that they have the right to disrupt electrical service. They have submitted sworn statements from chiefs who state that the chiefs who were seeking to control electricity were acting in their individual capacity and not in their official capacity. The Applicants for Service argue that NMPC, as a public utility, should

comply with its statutory, responsibilities and furnish. . .service to all persons who are otherwise qualified. Further, since electric service has been furnished to the reservations for decades, tribal consent to the agreements is both express and implied as a result of the course of dealing over the years.

In NMPC's Memorandum of Law in Opposition to the Motions to Dismiss, NMPC states that the Commission clearly has jurisdiction over the actions of NMPC. In addition, NMPC argues, the requested declaratory rulings should be issued because the relief requested is necessary to prevent discriminatory service.

DISCUSSION

The threshold issue is whether the Public Service Law applies to Indian reservations, thereby empowering the Commission with the authority to regulate directly the manner in which NMPC provides service on the reservation. Indian Nations have historically been subject to federal control. This long-standing history emanates partially from the United States Constitution Article 1, §8, cl. 3, which gives Congress plenary authority over Indian affairs. The Constitution states, in pertinent part, that Congress has the authority "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."

Because Indian Nations are subject to federal control, state laws are generally not applicable, absent Congressional consent. Because there is no applicable federal grant of authority, the Commission may not directly regulate the provision of electricity on Indian reservations.

The franschise agreements do not grant the Commission jurisdiction over the Indian reservations, but the Tonawanda and Tuscarora franchises do provide that NMPC will serve any applicant desiring service within the reservation upon the terms and provisions, rules and regulations of the company's schedules filed with the Commission. Thus, when and if the franchise agreements of the Tuscarora Nation of Indians and the Tonawanda Nation of Seneca Indians are approved by the federal government, the company's tariffs will require it to serve those reservations on a non-discriminatory basis The commission will not have jurisdiction over the Indian reservations, but it will have jurisdiction to interpret NMPC's tariffs and to require the company to comply with them.

CONCLUSION

Accordingly, the Commission finds and declares that it lacks jurisdiction over Indian reservations, but upon federal approval of existing signed franchise agreements, NMPC will be obligated to provide non-discriminatory service on the Tuscarora and Tonawanda reservations.

By the Commission,

(SIGNED) JOHN J. KELLIHER
Secretary